

DAVID GENE THOMAS,)	
)	
Petitioner,)	Case No. C09-21-MJP-BAT
)	
v.)	
)	REPORT AND
WASHINGTON STATE DEPARTMENT OF)	RECOMMENDATION
CORRECTIONS , et al.,)	
)	
Respondents.)	
)	

Petitioner, David Gene Thomas, is an inmate at the Monroe Correctional Complex in Monroe Washington. He has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 2003 convictions in King County Superior Court. Dkt. 10 at 1. On July 8, 2009, respondent filed a motion to dismiss contending petitioner's action is time barred under 28 U.S.C. § 2244(d)(1). Dkt. 19. Petitioner has not responded.

In 2003, petitioner was sentenced to 96 months of imprisonment following convictions for

1 child molestation and bail jumping in King County Superior Court Cause No. 01-1-02182-2-SEA.
2 Dkt. 10 at 2. Petitioner's timely appeal was denied by the Court of Appeals of the State of
3 Washington, Division I on July 11, 2005. *Id.* at 3. Petitioner thereafter filed a petition for review
4 in the Washington Supreme Court. The state supreme court denied the petition on May 31, 2006.
5 *Id.* at 4.

6 On July 16, 2007, petitioner filed a Personal Restraint Petition (PRP) in the Court of
7 Appeals of the State of Washington, Division I. *Id.* The PRP was denied on August 20, 2007. *Id.*
8 Petitioner subsequently moved for discretionary review in the Washington Supreme Court. *Id.*
9 That motion was denied on January 3, 2008. *Id.* at 4.

10 On January 2, 2009, petitioner placed the present habeas petition into the prison mailing
11 system. Dkt. 1.

12 **III. DISCUSSION**

13 **A. PETITIONER'S HABEAS PETITION IS TIME BARRED**

14 Under 28 U.S.C. § 2244(d)(1) a "1-year period of limitations shall apply to an application
15 for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court."
16 Pursuant to this section, the one-year limitations period runs from the date on which the judgment
17 became final by the conclusion of direct review or the expiration of the time for seeking such
18 review. 28 U.S.C. § 2244(d)(1). The period of time a properly filed application for post-
19 conviction review is pending in state court does not count toward the limitation period. *Id.* §
20 2244(d)(2).

21 The record establishes petitioner filed his federal habeas petition after the expiration of §
22 2244(d)(1)'s one-year statute of limitations. Petitioner's judgment became final by the conclusion
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1 of direct review on August 29, 2006, ninety days¹ after the Washington Supreme Court denied
2 review of petitioner's direct appeal. *Id.* at 4. At that point, the 1-year period of limitations began
3 to run. It ran from August 30, 2006 to July 16, 2007 when petitioner filed a PRP in the
4 Washington Court of Appeals, a period of 321 days. The PRP tolled the statute of limitations until
5 January 3, 2008 when the State Supreme Court denied review of the dismissal of the PRP and the
6 Court of Appeals issued a certificate of finality. Dkt. 19, ex. 8. Thereafter, the statute of
7 limitations ran an additional 366 days until January 2, 2009 when petitioner placed the present
8 habeas petition in the prison mailing system. Dkt. 1. In total, the statute of limitations ran for 687
9 days. Petitioner's habeas petition is therefore untimely.

10 The Court has also considered whether the statute of limitations should be tolled for
11 equitable reasons. Section 2244(d)(1)'s statute of limitations is subject to equitable tolling. *Pace*
12 *v. DiGuglielmo*, 544 U.S. 408, 418 (2005). However, equitable tolling "is appropriate only if
13 extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on
14 time." *Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002) (internal quotations omitted). A
15 habeas petitioner seeking equitable tolling bears the burden of proving "(1) that he has been
16 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."
17 *Pace*, 544 U.S. at 418. Here, petitioner has not argued he is entitled to equitable tolling and there
18 is nothing in record establishing that "extraordinary circumstance" beyond his control made it
19 impossible for him to file a timely petition. As there is no evidence that justifies statutory or
20 equitable tolling, petitioner's claims should be dismissed as time-barred under 28 U.S.C. §
21 2244(d)(1).

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23 ¹ See *Bowen v. Roe*, 188 F.3d 1157, 1158-9 (9th Cir. 1999) (Direct review concludes either upon
the expiration of the time to file a petition for writ of certiorari, which is 90 days, or when the
Supreme Court rules on the writ.)

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court recommends that petitioner's § 2254 petition be
3 DENIED and this case be DISMISSED with prejudice. A proposed order accompanies this
4 Report and Recommendation.

5 DATED this 20th day of August, 2009.

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8 BRIAN A. TSUCHIDA
9 United States Magistrate Judge
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